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**IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

Kirby Spencer,

Plaintiff,

v.

Wells Fargo Bank, N.A.

Defendant.

Case No. 2:14-cv-01648-LDG-GWF

**PLAINTIFF'S MOTION FOR  
LEAVE TO FILE A SECOND  
AMENDED COMPLAINT AND  
INCORPORATED  
MEMORANDUM OF POINTS  
AND AUTHORITIES**

Hon. Lloyd D. George

Magistrate Judge George Foley, Jr.

COMES NOW, Plaintiff KIRBY SPENCER, by and through his undersigned counsel,  
and files this *Motion for Leave to File a Second Amended Complaint*.

Dated: February 3rd, 2015.

Respectfully submitted,

CRAIG K. PERRY & ASSOCIATES

By: /s/ Craig K. Perry, Esq.

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*Attorney for Plaintiff*

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 Plaintiff Kirby Spencer ("Plaintiff") respectfully moves, pursuant to Fed. R. Civ. P.  
3 15, for entry of an Order granting him leave to file a Second Amended Complaint, attached  
4 hereto as Exhibit A. The proposed Second Amended Complaint adds class allegations, as  
5 Plaintiff seeks to go forward with this matter as a class action in which he represents two  
6 putative classes of individuals who were sent unauthorized automated "robocalls" by  
7 Defendant. In support of this Motion, Plaintiff states as follows:

8 **BACKGROUND**

9 On October 7, 2014, after receiving numerous unauthorized robocalls from Defendant  
10 Wells Fargo Bank, N.A. ("Defendant"), Plaintiff initiated this lawsuit under the Telephone  
11 Consumer Protection Act, 47 U.S.C. § 227 *et seq.*, against Defendant. The robocalls were all  
12 sent from a single identical phone number, (877) 647-8552, which is a number associated  
13 with Defendant. Under almost the exact same circumstances as Plaintiff's, countless  
14 consumers have complained of receiving unauthorized automated phone calls from  
15 Defendant through the same telephone number in an attempt to collect on a delinquent  
16 account even though they have never contacted Defendant, opened an account with  
17 Defendant, or given Defendant permission to place such calls. Below is just a small sample  
18 of complaints listed online which show that Defendant's conduct of repeatedly placing  
19 unauthorized automated calls to individuals who have no relationship with Defendant is  
20 widespread, causes much frustration, and remains an ongoing issue;

21 "I have never had an account with Wells Fargo so I don't know why they r calling me,  
22 I answer the phone and they hang up, probably get 3 to 4 calls a day from this  
23 number." (Jay, 11/20/2014.)

24 "They called me at least over 60 times over past month and its for someone else and I  
25 clicked that it was wrong person but they still keep calling and leaving 40  
voicemails." (Private, 11/8/2014.)

26 "I get calls several times a day on my relatively new cell phone from this number. I  
27 finally answered it, and got a recording saying, 'Please hold for an important  
28 message.', followed by music. I waited quite a while, but no one ever picked up, and  
I realized I was eating up my cell minutes for nothing, so I hung up . . . I finally



1 looked up the number and discovered it is Wells Fargo's overdraft department. I don't  
 2 even HAVE a Well's Fargo account, and never did . . . I truly wish there was a way  
 3 to prevent these vultures from calling my cell or to stop being CHARGED for these  
 4 calls . . . . It's expensive, and not fair." (Jeepers, 10/21/2014.)

5 "I got a call from this number and I just got a new phone #. I answered it after them  
 6 calling 2 times and the second time I got an automated message from Wells Fargo  
 7 asking for someone whom I don't know. So it is Wells Fargo." (Mary, 7/29/2014.)

8 Furthermore, since the filing of this lawsuit on October 7, 2014, and even after  
 9 Plaintiff filed his first Amended Complaint on October 27, 2014,<sup>1</sup> Plaintiff continued to  
 10 receive unauthorized automated phone calls from Defendant, and has received over 30  
 11 unauthorized robocalls since the filing of his original Complaint.

12 Based on Plaintiff's investigation and discovery to date, including information  
 13 relating to the mass transmission of automated calls from a single phone number, the number  
 14 of complaints asserted against Defendant's automated calling operation, and the ongoing  
 15 nature of Defendant's conduct despite a lawsuit being filed, Plaintiff would now like to add a  
 16 prayer for injunctive relief, as well as move forward with this case as a class action, on behalf  
 17 of all individuals who have received similar such unauthorized automated phone calls from  
 18 Defendant.

### 19 LEGAL STANDARD

20 Pursuant to Rule 15 of the Federal Rules of Civil Procedure, leave to amend  
 21 pleadings "shall be freely given when justice so requires." *DCD Programs, Ltd. v. Leighton*,  
 22 833 F.2d 183, 186 (9th Cir. 1987) (amendments to pleadings pursuant to Rule 15 "should be  
 23 applied with extreme liberality") (internal quotations omitted). Motions to amend under Rule  
 24 15 should be granted unless there is evidence of undue prejudice to the opposing party;  
 25 undue delay, bad faith, or dilatory motive on the part of the movant; or if the proposed  
 26 amendment is futile. *See Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051-52  
 27 (9th Cir. 2003); *Siller v. Aloya*, No. 14-cv-1810-GPC-MDD, 2015 WL 222470, at \*2-3 (S.D.

<sup>1</sup> Plaintiff filed his First Amended Complaint to remove the claim in the original Complaint  
 for violation of the Fair Debt Collection Practices Act.

1 Cal. Jan. 14, 2015); *Fradella v. City of Henderson*, 2:09-CV-0680-LRH-PAL, 2011 WL  
2 2183066, at \*1 (D. Nev. June 3, 2011).

3 While the consideration of prejudice is the factor that carries the greatest weight, *see*  
4 *Eminence Capital*, 316 F.3d at 1052, the party opposing amendment “bears the burden of  
5 showing prejudice.” *DCD Programs*, 833 F.2d at 187. “Absent prejudice, or a strong  
6 showing of any of the remaining *Foman* factors, there exists a *presumption* under Rule 15(a)  
7 in favor of granting leave to amend.” *See Eminence Capital*, 316 F.3d at 1052 (emphasis in  
8 original). In this case, none of the aforementioned factors are present at all, much less  
9 sufficiently to overcome the presumption that this amendment should be freely granted,  
10 particularly at this very early stage of the litigation.

#### 11 ARGUMENT

12 The proposed Second Amended Complaint adds allegations relating to the  
13 maintenance of this case as a class action, clarifies Plaintiff’s theory of the case, and adds a  
14 prayer for injunctive relief, but does not otherwise materially alter the underlying claims  
15 from the first Amended Complaint. The maintenance of this suit as a class action will not  
16 require new substantive “theories” or any additional expert testimony as, for example,  
17 Defendant’s use of an automatic telephone dialing system to make the calls will be  
18 established in the same way for Plaintiff individually as it would be for the putative class as a  
19 whole. As a result, the proposed Second Amended Complaint cannot be said to prejudice  
20 Defendant in any way, especially when the addition of class allegations would only require a  
21 few additional discovery requests at a time when no discovery schedule has even been set  
22 yet. *See Legg v. E-Z Rent A Car, Inc.*, No. 14-cv-1124-WQH-BGS, 2014 WL 4805206 (S.D.  
23 Cal. Sept. 26, 2014) (granting motion for leave to amend the complaint to alter class  
24 allegations and noting a lack of prejudice to the defendant) (citing *Eminence Capital*, 316  
25 F.3d at 1052).

26 While amending the Complaint to add class allegations would result in Plaintiff  
27 filing a motion for class certification at the appropriate time in this case, Defendant would be



1 no more prejudiced than if this case had been initially filed as a class action. Likewise, the  
2 amendment would not be futile, since Plaintiff is confident in his ability to certify the classes  
3 and should have the opportunity to satisfy his burden in a formal class certification motion at  
4 a later time. Of course, Defendant remains free to oppose class certification but should do so  
5 at the appropriate time in opposition to the motion for class certification. *See U.S. Bank Nat.*  
6 *Ass'n v. Friedrichs*, No. 12-cv-2373-GPC-KSC, 2013 WL 6686327, at \*4 (S.D. Cal. Dec. 17,  
7 2013) (granting leave to amend and stating that the court would defer any challenges to the  
8 merits of the proposed amended complaint until after leave to amend is granted); *Legg*, 2014  
9 WL 4805206, at \*2 (same). In short, any class-related discovery would be relatively modest,  
10 and the addition of class allegations at this early stage in the case would not be futile and  
11 would not prejudice Defendant any more than if this case were originally filed as a class  
12 action.

13       Additionally Plaintiff seeks leave to amend the Complaint in good faith and not for  
14 any improper purpose, comports the factual and legal allegations to the evidence obtained  
15 through investigation to date, including Plaintiff's investigation into the telephone number  
16 from which the telephone calls were made and the existence of multiple additional informal  
17 online complaints from individuals throughout the country. Most importantly, Plaintiff is  
18 motivated to bring this action as a class action and to add a prayer for injunctive relief due to  
19 Defendant's repeated failure to cease placing unauthorized automated telephone calls to his  
20 cellular telephone even *after* he filed his original Complaint on October 7, 2014 and even  
21 *after* he filed his first Amended Complaint on October 27, 2014. Defendant's automated  
22 debt collection operation is so fatally deficient in its ability to stop placing unauthorized  
23 phone calls that even one month after a lawsuit has been filed seeking to stop the calls it  
24 continues to place them. Based on the nature of Defendant's conduct demonstrated after the  
25 filing of this lawsuit, as well as industry practice, Plaintiff now seeks to amend in good faith  
26 in an effort to represent all individuals who, like him, have received and continue to receive  
27 unauthorized automated calls from Defendant.

1 Complaint was filed on December 23, 2014, before any case management schedule or  
2 discovery scheduling order has been entered, prior to the propounding of any discovery, and  
3 prior to the scheduling of any depositions.

4 WHEREFORE, Plaintiff Kirby Spencer respectfully requests that this Court enter an  
5 Order granting his Motion for Leave and permitting Plaintiff to file his Second Amended Class  
6 Action Complaint.

7 Dated: February 3rd, 2015.

Respectfully submitted,

8 CRAIG K. PERRY & ASSOCIATES

9 By: */s/ Craig K. Perry, Esq.*

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**CERTIFICATE OF SERVICE**

I hereby certify that on February 3<sup>rd</sup>, 2015, I electronically filed the forgoing *Plaintiff's Motion for Leave to File a Second Amended Complaint and Incorporated Memorandum of Points and Authorities* with the Clerk of the Court using the CM/ECF system. Notice of this filing is sent to all counsel of record by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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Dated: February 3<sup>rd</sup>, 2015

By: 

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